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ABSTRACT

The mirror state counterplan is a straightforward form of negative refutation used in debate in which the negative team proposes that each state enact a miniature version of the affirmative plan that was to be adopted on the federal level. For example, the 1981-82 national debate proposition resolved that the federal government should significantly curtail the powers of labor unions in the United States. A mirror state counterplan would call for the states to significantly curtail the powers of labor unions within their borders. Negative teams can use the mirror state counterplan and still fulfill the general requirements that negative counterproposals must meet: nontopicality, mutual exclusivity, and superiority. A mirror state counterplan can also fulfill the particular requisites inherent in the specific type of policy option. Recent criticism of the mirror state counterplan by Dempsey and Hartmann argues that fiat power is unrealistic because all fifty states would not adopt a law on their own and if they did, the laws would not be uniform. This confuses "would" with "should": fiat power lies within the realm of physical possibility and is limited to the "scope of could." Furthermore, laws need not be uniform, but solvent and effective. Dempsey and Hartmann assume that mirror state counterplan laws would not be solvent because they are not identical. Their criticism of the mirror state counterplan rests on these interrelated misconceptions about the nature of fiat power. The mirror state counterplan is an old but valid form of negative refutation. (SRT)

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CURRENT PRACTICE IN RELATION TO THE PAST: THE MIRROR STATE COUNTERPLAN

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ABSTRACT

The theoretical perspectives of intercollegiate debate are still shifting and the various strategies and tactics for use in convincing judges still need to be continually evaluated. The mirror state counterplan is a relatively old, simple, and straightforward form of negative refutation. Many years ago it constituted the typical, almost traditional, form of negative counterproposal. It was valid as a form of negative refutation then, and remains so today.

CURRENT PRACTICE IN RELATION TO THE PAST:

THE MIRROR STATE COUNTERPLAN

Several years ago a colleague of mine and I argued that:

> The theoretical perspectives of intercollegiate debate constantly shift. One of the most notable fluctuations of the past decade concerns changing affirmative case constructs. Developing from the stock issues case, has been the comparative advantages case, the utilities case, and the cost benefits analysis case. In addition to these approaches, affirmative teams utilize goals cases, criteria cases, and alternative justification cases, thereby providing them with various strategies and tactics for use in convincing judges. In light of the increasing options open to the affirmative, a necessity arises to reconsider the various strategies open to the negative.[1]

Richard H. Dempsey and David J. Hartmann have undertaken such a reconsideration in their recently published article entitled "Mirror State Counterplans: Illegitimate, Topical, or Magical?"[2] The purpose of this essay is to evaluate the mirror state counterplan both generally and in light of the criticisms leveled against it by Dempsey and Hartmann. Specifically, I will advance three major areas of argumentation: (1) Mirror state counterplans can fulfill the general requirements which negative counterproposals must meet. (2) Mirror state counterplans can fulfill the particular requisites inherent in this specific type of policy option. And (3) the recent criticisms of the mirror state counterplan by Dempsey and Hartmann rest on interrelated misconceptions concerning the nature of fiat power.

Mirror state counterplans are not new. They were in use when I debated in high school -- a time frame, which contrary to the rumors started by some of my students, did not interface with the Lincoln-Douglas debates, but which did precede the Kennedy-Nixon debates. The basic notion underlying mirror

state counterplans can be expressed in the single statement: let the states do it. The fundamental idea is that each state can enact a miniature version of an affirmative plan -- the latter to be adopted on the federal level. For example, the 1981-1982 national debate proposition was Resolved: That the Federal Government should significantly curtail the powers of labor unions in the United States. A mirror state counterplan would call for the states to significantly curtail the powers of labor unions within their borders. With this definition in mind, let us turn to the first argument to be considered: mirror state counterplans can fulfill the general requirements which negative counterproposals must meet.

Traditionally, debate theory has held that regardless of the specific resolution under consideration, a negative counterplan must meet certain requirements if it is to be prima facie. In other words, there are resolutionally invariant requisites for a negative counterproposal. While the exact terminology for these requirements varies according to the individual theorist under consideration, usually they are enunciated as being: (1) non-topicality, (2) mutual exclusivity, and (3) superiority.[3]

The first two characteristics, non-topicality and mutual exclusivity, are logical consequences of the major mandate under which all negative teams operate: the duty of the negative is to deny the resolution. Since the first duty of the negative is to deny the resolution, the counterproposal must be non-topical. Obviously, if the counterplan is topical the negative is supporting, not denying, the resolution. Similarly, the counterplan must be mutually exclusive from the policy option advocated by the affirmative team. The judge(s) must have to chose between, or even among, the com-

peting policies. If the judge(s) could vote for all of the policies advocated in a given debate, including the counterplan, in a rational manner,[4] then the negative team would have failed to meet their primary responsibility of denying the resolution; additionally, the affirmative team would have achieved their primary obligation of upholding the resolution.

While the third characteristic of a counterproposal, superiority, is not, in my opinion, as essential, or as universally agreed upon,[5] as the first two, it is, nevertheless, important. As has been argued:

> Some theorists argue that the counterplan must be superior to the affirmative proposal.[6] The rationale for this position hinges on the notion that, if the affirmative plan is as good as the counterplan, then the resolution has not been defeated and the negative should lose. Although it seems hypothetical that a debate involving two explicit policy systems could end in a virtual tie, if that did occur, the presumption should rest with which ever proposal involves less risk. Thus, the negative counterplan should be superior in some way, albeit less risk, to the arrirmative proposal.[7]

The question now arises: can a mirror state counterplan meet these three basic requirements? To help commence an answer to this query let us focus on the issue of non-topicality and hypothesize that two teams are debating the proposition Resolved: That the Federal Government should abolish laws regulatint the manufacutre, sale, distribution, and possesion of obscene and/or pornographic material(s). The affirmative argues that such action should be taken and, logically enough, proposes a constitutional amendment which expands the scope of the first amendment so that heretofore obscene and/or pornographic material(s) become protected as free speech. Such an amendment would have the effect of overturning Supreme Court decisions such as Miller and Paris Adult Theatre I as well as rendering unconstitutional laws such as comstock. In response, the negative team can argue that the abolition should be effected, not by the affirmative plan, but by the actions of the states. As the affirmative team has opertionally defined the resolution in terms of a constitutional amendment, and, as the agent of action is The Federal Government, the negative counterplan constitutes a clear denial of the resolution.[8]

Thus the negative counterplan is non-topical. Austin J. Freeley furnishes support for this topicality analysis in writing:

> The negative may establish that its counterplan is nonpropositional (or nontopical) in a number of ways. It may argue that the counterplan should be carried out by a different level of government than that called for in the resolution (e.g., the states rather than the federal government should do it.)[9]

Negative teams can achieve mutual exclusivity for their policy option in several ways. They may use the funding needed to implement the affirmative proposal for their plan. They may usurp the affirmative team's funding mechanisms. They may be able to exploit a time lag by which it is impossible to implement the affirmative proposal as quickly as the negative counterplan. Thus, when the judge(s) vote at the end of the round, the negative plan is implemented first and, arguendo, the need for the affirmative policy is obviated. Depending on the particulars of the resolution being debated, and the provisions of the mirror state counterplan, all three of the options, as well as others, are available.

As has been previously indicated, negative debaters often try to achieve counterplan superiority by proving that the negative counterproposal entails less risk than the affirmative policy option. Freeley cites the following example:

> ...on the "consumer product safety" proposition, negatives using a "states" counterplan argued that the states rather than the federal government should regulate a particular consumer product--if a plan turned out to be undesirable, less harm would be done on a statewide basis than if the plan were nationwide. If the plan turned out to be desirable, then other states would adopt it.[10]

It would appear then that, taken at face value, a mirror state counterplan can fulfill the three basic requirements which all negative counterplans must meet. The question now arises: can a mirror state counterplan fulfill any specialized requirements inherent in this specific type of counterproposal?

The major particularized requirement for a mirror state counterplan would appear to be that the action(s) of the states must be arguably able to achieve the results of the affirmative proposal. This is a requirement which is resolutionally variant. Sometimes, the national proposition obviously lends itself to a mirror state counterplan approach; the previously referenced examples of the 1976-1977 consumer product safety topic and the 1981-1982 labor union topic are cases in point. Sometimes, the wording of the national resolution precludes, or at least militates against, the use of a mirror state counterplan. I cannot envision, for example, a mirror state counterplan on either the 1974-1975 proposition, Resolved: That the power of the Presidency should be significantly curtailed, or the 1977-1978 resolution That law enforcement agencies should be given significantly greater freedom in the investigation and/or prosecution of felony crimes.[11] However, the fact that a mirror state counterplan is resolutionally variant in no way denies its theoretical validity. This observation concerns a practical limitation not a theoretical one.

Now that the mirror state counterplan has been examined with regard to its ability to fulfill the general requirements which all negative counterproposals must meet, as well as the particular requirements of this type of counterplan, we are ready to consider the third major argument of the essay: the recent criticisms of the mirror state counterplan by Dempsey and Hartmann

rest on an interrelated misconception concerning the nature of fiat power.

In the game-like world of competitive tournament debating, fiat power is simply another of the rules of the game. In the real world, it would be all but impossible for two college students, let alone two high school students, to implement the policies which an affirmative team calls for in their plan. Since, in actuality, the plan could not be implemented, it could not be thoroughly analyzed and evaluated. Therefore, the processes and merits of competitive tournament debate would be thwarted. Thus, to solve this problem, the idea of fiat power has evolved.

Fiat power is just a way of saying "hypothetically" or "for the sake of argument let us assume this affirmative plan to be implemented." Under these stipulations, the negative team can more easily debate another area of clash -- the results of the plan. While fiat power is a way of saying "let's pretend," there are limits to the pretense. These are common sense limitations designed to improve the quality of competitive debating. For example, the affirmative team cannot fiat the physically impossible e.g., the affirmative cannot fiat, a magic wand to cure the ills of the world. This limitation, which has been referred to as "the scope of could,"[12] holds that what an affirmative advocates and fiats must be within the realm of physical possibility. It could happen. This does not mean that it would happen. This does not mean that it is even likely to happen. It means only that it is theoretically possible for the advocated proposal to be implemented. Obviously, it avails us little to debate magic wands and mystical cures and neither side can fiat these.

Similarly, neither side can fiat away problems associated with the policy options which they espouse -- problems such as the lack of solvency or the presence of disadvantages.

Gerald H. Sanders gives a straightforward explication of fiat power when he writes:

> Another right of the affirmative that is important is the power of fiat. This means that the affirmative can mandate the implementation of their proposal. Remember that all debate resolutions contain the word "should" in them. If the negative were to be able to argue legitimately that the affirmative plan will never be adopted by congress, for instance, the entire debate could revolve around this issue and you would never consider the substance of the issues involved. In fact, the negative could be admitting attitudinal inherency if they argued in this manner. However, in order to preclude this possibility, the affirmative can fiat their proposal into existence. In other words, they only have to argue that the proposal "should" be adopted, not that it "would" be adopted. This is why a negative argument like the one mentioned above is called a "should-would" argument and is not legitimate in academic debate.[13] Let me hasten to add that the affirmative is limited to fiating their program into existence. They cannot fiat solvency. Also, the negative can argue some of the reasoning behind congress' attitude against the affirmative proposal. There may be the source of some good disadvantages here. However, an argument that simply states that congress will not adopt the proposal is overcome by the affirmative fiat power.[14]

Theodore F. Sheckels, Jr. supplies a similar analysis of fiat power without restricting it to any one side when he states:

> The word "should" appears often in policy resolutions. I have not treated it as a key term in need of definition because its definition in debating is fairly standardized. "Should" means "ought to but not necessarily will." This standardized definition implies two important conventions of debate: (1) that the team advocating the resolution <u>does not</u> have to show it will be adopted; (2) that the team advocating the resolution <u>does not</u> have to show that a Constitutional amendment will be passed by Congress and ratified by the requisite

> number of states if an amendment is necessary for the presented or implied policy to take effect. Both of these conventions are subsumed under the term "fiat power." The team advocating a policy is permitted to command or "fiat" the presented or implied policy into operation, bypassing, as it were, the necessary legislative actions. This convention has long been observed in debating so that attention will be directed toward the merits of the resolution, not the political dimensions any presented or implied policy possesses. Beginning debaters need to know about this convention so that they do not waste time discussing whether Congress will or will not pass a policy.[15]

Fryar and Thomas give a succinct summary of the concept in defining fiat as:

> An assumed power to put a proposal into effect; a legal mandate binding on the parties involved, overriding their personal attitudes. Debaters are allowed to say their proposals are to be implemented "by fiat" for the sake of avoiding quibbles over whether, in the real world, such proposals could be expected to receive approval. Fiat power is limited to matters subject to law; it is not a "magic wand" to avoid substantive argument. For example, an energy bill could be adopted by fiat, but a new oil supply cannot be discovered by fiat.[16]

Dempsey and Hartmann misanalyze the nature of fiat power; their misanalysis includes: (1) the confusion of should with would, and some attendant strawperson argumentation arising from this confusion, and (2) the misanalysis of authoritative testimony regarding the nature of fiat.

Dempsey and Hartmann confuse should with would. For example, in discussing the mirror state counterplan they assert, "all fifty states simply won't adopt laws on their own." [17] They then conclude that, since the states won't adopt such laws, a negative debate team cannot legitimately propose such a counterplan.[18] Maybe all fifty states would adopt uniform laws on their

own if the reasons for doing so were rationally compelling. This is an idea which I will address subsequently. However, whether the states would or would not so act is not the major issue which needs to be considered. In terms of competitive tournament debate, the issue is whether they should, not whether they would. Dempsey and Hartmann commit a should-would argument. They ignore a central aspect of fiat power. In the words of Sheckels, previously noted, "The team advocating a policy is permitted to command or 'fiat' the presented or implied policy into operation, bypassing, as it were, the necessary legislative actions."[19] The negative can bypass the necessary legislative actions in their counterplan as can the affirmative in their plan. To argue that the legislative actions would not happen, and therefore that the negative counterplan would not eventuate, clearly lies outside the limits of contest debating.

Furthermore, the idea of uniform laws which Dempsey and Hartmann advance, is a strawperson argument. All fifty states have adopted laws against actions such as arson, murder, and rape. While it is true that these laws vary from state to state, it is relatively unimportant. The laws vary because each state legislature acting rationally (we hope) passed variants of the law which, in their opinion, were best suited for the particular problems and social values of the individual state in question. If the problems and societal values of each state were as uniform as the problems and societal values argued in a first affirmative constructive, the probability of uniform state laws would be increased. Also, if there were overriding reasons for uniform state laws, if uniform state laws should be passed, if such laws were indeed logically desirable, then the probability of the passage of uniform laws, by state legislatures, would be greater.

The important issue to be considered is not whether the laws are uniform, but whether the laws are solvent. Laws vary from state to state neither because of a plot to reduce the effectiveness of jurisprudence nor because of accident. Laws vary from state to state because, in the opinion of state lawmakers, a specific version of a law is more appropriate for that particular state. In the opinion of state lawmakers, the individuality of state laws increases their solvency. Thus, Dempsey and Hartmann assume, without proof, that non uniform,but similar, state laws could not be used in a mirror state counterplan. They assume that such laws would not be solvent because they are not identical.

Dempsey and Hartmann further assume that states would not pass uniform laws even if it were in their interest to do so. However, they do cite evidence to the effect that states have profited from non uniform laws and that therefore, it is in the rational self interest of states to enact such laws.[20] If the rationale for any particular course of action was as great as the typical first affirmative constructive, i.e., mounds of dead bodies, or mounds of injured, wounded, maimed, and bleeding bodies, or economic loss, or even the potential for any or all of the above, then that course of action would, hopefully, be adopted by rational lawmakers, albeit rational lawmakers representing fifty states. Dempsey and Hartmann, in short, ignore what some theorists have referred to as "the inherent and compelling need." [21]

In addition to confusing should with would and engaging in strawperson argumentation, Dempsey and Hartmann make several other statements which indicate some confusion either as to the nature of fiat or as to their research

methodologies. For example, they cite Austin J. Freeley extensively on the nature of fiat power:

> Freeley (1981) like others, limits fiat power by noting that it cannot extend to 'unreasonable' provisions and that the plans are subject to the normal political processes associated with the agent of action (p.167).[22]

Dempsey and Hartmann then assert that "negatives typically implement mirror counterplans" [23] in ways that are unreasonable and not "subject to the normal political processes." [24]

A comparison of the actual statement in Freeley's text with the paraphrase cited by Dempsey and Hartmann leads me to believe that Freeley's meaning of unreasonable and normal political processes is different from the meaning inferred by Dempsey and Hartmann. The following is the complete quotation from Freeley. The underlined part represents the statements cited by Dempsey and Hartmann.

> Affirmatives may fiat reasonable provisions for their plan. For instance, they may stipulate that their administrative body be bipartisan or nonpartisan; they may stipulate geographic representation; they may provide that members of the body be lawyers, physicians, or accountants or meet various professional standards. Indeed, they may stipulate anything for which there is a reasonable warrant or relevant analogy.
>
> Affirmatives may <u>not</u>, however, fiat <u>unreasonable provisions</u> for their plan. For instance, in a debate on consumer protection, the affirmatives may not fiat that their administrative body will be headed by Ralph Nader; in a debate on crime control, they may not fiat that the members of their administrative body will be incorruptible, if they designate a Congressional committee to investigate the CIA, they may not fiat that all of the members will be left-wing Democrats. In short, the affirmative plan is <u>subject to normal polical processes</u> and its members are subject to normal human frailties. The affirmative may not appoint "Jesus Christ

> Superstar" to its administrative body and stipulate that miracles will be passed to overcome attitudinal inherency and any other problems that block the status quo from functioning in a state of perfection. [25]

My interpretation of this passage is that the term normal political processes, essentially means the possible. Unreasonable provisions are provisions which, by Freeley's examples, are impossible to guarantee other than by the use of fiat power which would constitute a petitio principii. Certainly, nothing in Freeley's text condemns mirror state counterplans; rather, as has been indicated, Freeley specifically holds that the negative may argue them.[26] This latter fact also seems to indicate that Dempsey and Hartmann misanalyze or misapply Professor Freeley's treatment of fiat power and the counterplan. They then use this misanalysis to argue against a legitimate form of negative argumentation -- the mirror state counterplan.

The theoretical perspectives of intercollegiate debate are still shifting, and the various strategies and tactics for use in convincing judges still need to be continually evaluated. The mirror state counterplan is a relatively old, simple, and straightforward form of negative refutation. Many years ago, it constituted, in my opinion, the typical, almost traditional, form of negative counterproposal. Certainly, the mirror state counterplan is no less valid today than it was in that era presaging the Kennedy-Nixon debates.

NOTES

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[1]M. Gordon Widenhouse and Dean Fadely, "Negative Constructs: A Perspective," Debate Issues XI (January, 1978), pp. 9-13.

[2]The Journal of The American Forensic Association XXI (Winter, 1985), pp. 161-166. Other articles which have undertaken this reconsideration while treating issues relevant to this discussion include: Robert Branham, "The Counterplan as Disadvantage," Speaker and Gavel XVI (Summer, 1979), 61-66; and Michel E. Mayer and Jerold Hall, "Evaluating the Studies Counterplan: Topicality and Competitiveness," Speaker and Gavel XVI (Summer, 1979), 67-72.

[3]Widenhouse and Fadely; Allan J. Lichtman and Daniel M. Rohrer, "A General Theory of the Counterplan," in Advanced Debate Readings in Theory, Practice, and Teaching, ed. David A. Thomas (Skokie: National Textbook Company, 1979), pp. 200-212; Austin J. Freeley, Argumentation and Debate Reasoned Decision Making (Belmont: Wadsworth Publishing Company, 1981), pp. 211-216; Maridell Fryar and David A. Thomas, Basic Debate (Lincolnwood: National Textbook Company, 1983), pp. 88-90; and Theodore F. Sheckels, Jr., Debating Applied Rhetorical Theory (New York: Longman Inc., 1984), pp. 157-161, 207-210. For a slightly different interpretation, see: Sanders who, although he admits "some variance with other writers in this area," takes a similar position. Gerald H. Sanders, Introduction to Contemporary Academic Debate (Prospect Heights: Waveland Press, 1983), pp. 107-115.

[4]The important phrase to remember is, in a rational manner; if the negative counterplan alone is better than either the affirmative plan alone or the negative counterplan plus the affirmative plan, then it would not be a rational decision to vote for either the affirmative plan alone or the affirmative plan plus the negative counterproposal.

[5]For example, see: J.W. Patterson and David Zarefsky, Contemporary Debate (Boston: Houghton Mifflin Company, 1983), p. 218. Also, see: The fourth edition of Freeley, p. 219.

[6]In addition to the sources cited in footnotes 3 and 4, see: Glenn R. Capp and Thelma Robuck Capp, Principles of Argumentation and Debate (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1965), pp. 50-52. Wayne C. Eubank, "Developing the Case," in Argumentation and Debate: Principles and Practices, ed. James H. McBath (New York: Holt, Rinehart and Winston, Inc., 1963), pp. 113-116; Glen E. Mills, Reason in Controversy 2nd ed. (Boston: Allyn and Bacon, Inc., 1968), p. 108; and Wayne N. Thompson, Modern Argumentation and Debate: Principles and Practices (New York: Harper and Row, Publishers, 1971), pp. 88-92.

[7]Widenhouse and Fadely, p. 12.

[8]I would argue that even if the resolution did not specify an agent of action, the negative team, depending on the particulars of the debate, could propose a sound mirror state counterplan.

[9]Freeley, pp. 211-212.

[10]Freeley, p. 212.

[11]I am not always in agreement with Arthur Schopenhauer's rather cynical observation that "every man takes the limits of his own field of vision for the limits of the world." Just because I cannot envision a mirror state counterplan on these propositions does not mean that the evermore creative and imaginative mind of an intercollegiate debater could not generate one. However, for the sake of discussion, I am willing to stipulate that some national resolutions preclude the use of mirror state counterplans and cite two instances which I consider to be examples of such preclusion.

[12]David A. Ling and Robert V. Seltzer, "The Role of Attitudinal Inherency in Contemporary Debate," The Journal of the American Forensic Association VII (Spring, 1971), pp. 278-283. See especially: p. 280.

[13]In discussing a should-would argument, H. Francis Short states, "... when the affirmative argues that its proposition should be accepted, it does not have to defend the would argument. Its plan assumes the nature of a fiat. From: H. Francis Short, "Affirmative Case Building," in Introduction to Debate, ed. Carolyn Keefe, Thomas B. Harte, and Laurence E. Norton (New York: Macmillian Publishing Company, Inc., 1982), p. 175. Austin J. Freeley is even more explicit in his discussion of the illegitimacy of should-would when he writes, "The negative team must avoid the pointless, in educational debate, 'should-would' argument. The point is not would - but should - the affirmative proposal he adopted," (Emphasis Freeley's), Freeley, pp. 47-48.

[14]Sanders, p. 56.

[15]Sheckels, p. 14.

[16]Fryar and Thomas, p. 198.

[17]Dempsey and Hartmann, p. 162.

[18]Dempsey and Hartmann.

[19]Sheckels, p. 14.

[20]Dempsey and Hartmann, p. 162.

[21]For example, see: Robert P. Newman, "The Inherent and Compelling Need," The Journal of the American Forensic Association II (May, 1965), pp. 66-71.

[22]Dempsey and Hartmann, p. 161. The inclusion of the words "associated with the agent of action" are apparently Dempsey and Hartmann's as they do not appear on page 167, or on page 168 for that matter, of Freeley's text.

[23]Dempsey and Hartmann, p. 161. Also, see: p. 163.

[24]Dempsey and Hartmann, pp. 161-164.

[25]Freeley, pp. 167-168.

[26]Freeley is not alone in explicitly stating the legitimacy of mirror state counterplans. Sanders also indicates that the use of a mirror state counterplan is a legitimate line of negative refutation; although, he suggests that it, along with the conditional counterplan, the hypothetical counterplan, and the studies counterplan, constitutes "poor strategy in academic debate." Sanders, pp. 111-112.